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INTRODUCTION

On April 23, 2010, the Virginia Attorney General issued two “Civil Investigative Demands” (“CIDs”) to the University of Virginia (Exhibits 1-2). The CIDs seek from the University extensive information relating to research conducted by a former University professor, Dr. Michael Mann. The Attorney General issued the CIDs pursuant to the Virginia Fraud Against Taxpayers Act (“FATA”), which provides civil penalties for fraud committed on Commonwealth taxpayers.

The Virginia Attorney General does not appear ever before to have issued a FATA CID aimed at peer-reviewed research conducted by a university faculty member. The Attorney General’s CID authority under FATA is limited to investigating potential violations of FATA – not probing the merits of scientific theories or furthering some other agenda. Yet that is all these CIDs do. What the CIDs do *not* do is satisfy the basic statutory requirements for their issuance.

Under FATA, a CID must state “the nature of the conduct constituting the alleged violation of a false claims law that is under investigation,” and the Attorney General must have an objective “reason to believe” that the CID recipient has information about a FATA violation. Neither prerequisite is satisfied here. The five identified grants do not even implicate FATA. Four were awarded by federal agencies and involved payments of federal funds, and the one University grant was awarded two years before FATA became effective. And there accordingly is no objective “reason to believe” that information the University may have about any of the five grants or the academic and scientific research they funded would plausibly support a FATA claim.

The CIDs fail at the threshold for other reasons as well. For one thing, the governing statute makes no provision for CIDs to issue against an agency of the Commonwealth. Further,

the scope of the information goes far beyond the investigation of a potential FATA violation. The Attorney General's requests are truly sweeping, seeking virtually all of Dr. Mann's academic and scientific research "data, materials, and communications" over a period of more than ten years. There is, in short, no nexus between the CIDs' extremely broad requests and a potential FATA violation.

There is, however, an obvious and destructive nexus between the CIDs and academic speech. Enforcing the CIDs against the University – subjecting Thomas Jefferson's "academical village" to a sweeping and baseless "fraud" inquiry – threatens bedrock principles of limited government and academic freedom upon which this Nation has rested for more than two centuries.

This case does not ask the Court to wade into the climate debate, but rather to apply well-settled principles of Virginia law. The CIDs are fundamentally legally flawed. Enforcing them will set a harmful precedent for the Commonwealth and all of its institutions of higher learning. For these reasons, and as explained below, the CIDs should be set aside.

STATUTORY BACKGROUND

CIDs. A CID is "an administrative subpoena." *In re Oral Testimony of a Witness Subpoenaed Pursuant to Civil Investigative Demand No. 98-19*, 182 F.R.D. 196, 202 (E.D. Va. 1998). The General Assembly has limited the Attorney General's authority to issue CIDs by tethering it to specific statutory frameworks. *See, e.g., Paramount Builders, Inc. v. Commonwealth*, 260 Va. 22, 26-27 (2000) (to investigate potential violations of the Consumer Protection Act); *In re Civil Investigative Demand No. H-13, LE 56*, 1981 WL 180532, at *13 (Va. Cir. Ct. City of Richmond, June 3, 1981) (to investigate potential antitrust violations).

FATA. FATA provides for liability for submitting or causing to submit false or fraudulent claims for Commonwealth funds. *See* Va. Code Ann. § 8.01-216.3(A)(1), (2), (3). A claim is defined as “any request or demand . . . for money or property . . . if the Commonwealth provides any portion of the money or property that is requested or demanded, or if the Commonwealth will reimburse . . . any portion of the money or property that is requested or demanded.” *Id.* § 8.01-216.2. The Attorney General can investigate FATA violations, *id.* § 8.01-216.4, including by issuing a CID “stat[ing] the nature of the conduct constituting the alleged violation of a false claims law that is under investigation” if “the Attorney General has reason to believe that [the CID recipient] may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation.” *Id.* §§ 8.01-216.10(A), 8.01-216.11. Enacted in 2002, FATA became effective January 1, 2003. *See* Virginia Acts 2002, c. 842.

FACTUAL BACKGROUND

“Climategate” Emails. In November 2009, thousands of emails and related data and documents were stolen from a computer system at the Climatic Research Unit (“CRU”) of the University of East Anglia in Great Britain. The stolen emails and data were subsequently posted on the internet.

Some claimed the stolen emails showed that members of the climate science community, including Dr. Mann, had manipulated research data – thus the “climategate” moniker. Those allegations of research improprieties have been investigated by an international panel established by the University of East Anglia (Exhibit 3, International Panel Report (Apr. 12, 2010)), and United Kingdom’s House of Commons Science and Technology Committee (Exhibit 4, House of Commons Report (Mar. 31, 2010)). A committee of the United States House of Representatives

also held a hearing and issued a report. Exhibit 5, Transcript, House Select Energy Independence and Global Warming Committee Holds Hearing on the State of Climate Science (Dec. 2, 2009); Exhibit 6, Report of Select Committee on Energy Independence and Global Warming, “Select Committee staff analysis of the stolen electronic documents from the CRU.” None of these investigations found any manipulation or falsification of data in the conduct of the research.¹ As the Intergovernmental Panel on Climate Change, Working Group I, put it: “The internal consistency from multiple lines of evidence strongly supports the work of the scientific community, including those individuals singled out in [the “climategate”] email exchanges.” Exhibit 8, Statement by Working Group I of the Intergovernmental Panel on Climate Change (Dec. 4, 2009).

EPA’s Endangerment and Cause or Contribute Findings for Greenhouse Gases. In late December 2009, EPA issued what is called an “Endangerment and Cause or Contribute Finding” for greenhouse gases under Section 202(a) of the Clean Air Act. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009). In that issuance, the EPA Administrator concluded:

¹ The international panel established by the University of East Anglia to examine the research of its Climatic Research Unit specifically examined whether “climatic data had been dishonestly selected, manipulated and/or presented to arrive at pre-determined conclusions that were not compatible with a fair interpretation of the original data.” Exhibit 3, International Panel Report at 1. The panel concluded that there was “no evidence of any deliberate scientific malpractice in any of the work of the Climatic Research Unit and had it been there we believe that it is likely that we would have detected it.” *Id.* at 5.

A panel established by The Pennsylvania State University, where Dr. Mann has been on faculty since 2005, reached a similar conclusion: “[T]here exists no credible evidence that Dr. Mann had or has ever engaged in, or participated in, directly or indirectly, any actions with an intent to suppress or to falsify data.” Exhibit 7, The Pennsylvania State University Report at 5 (Feb. 3, 2010).

The House of Commons Science and Technology Committee in the United Kingdom reached the same conclusion. Exhibit 4, House of Commons Report at 50 (Mar. 31, 2010).

The Administrator finds that six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations. The Administrator also finds that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a). These Findings are based on careful consideration of the full weight of scientific evidence and a thorough review of numerous public comments received on the Proposed Findings published April 24, 2009.

Id. at 66,496. As EPA explained, “the body of scientific evidence,” including “major assessments by the U.S. Global Climate Research Program (USGCRP), the Intergovernmental Panel on Climate Change (IPCC), and the National Research Council (NRC) serve as the primary scientific basis supporting the Administrator’s endangerment finding.” *Id.* at 66,497.

The Commonwealth’s EPA Litigation. In February 2010, the Commonwealth filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit, challenging the EPA’s Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (“EPA Lawsuit”). *See* Exhibit 9, Petition in *Commonwealth of Virginia v. EPA*, Case No. 10-1036 (D.C. Cir., filed Feb. 16, 2010). Citing the “climategate” emails, the Commonwealth requested an order requiring EPA to reconsider its finding that climate change poses a threat to public health and welfare.² Because the EPA Lawsuit proceedings before the D.C. Circuit are limited to the administrative record, there is no discovery.³

² *See* Exhibit 10, Office of Attorney General Press Release, “Cuccinelli Petitions EPA and Files for Judicial Review” (Feb. 17, 2010); Exhibit 11, Office of Attorney General Press Release, “Virginia Attorney General Files Motion to Compel EPA to Reconsider Carbon Dioxide Regulation” (Apr. 16, 2010).

³ In April 2010, the Commonwealth filed a motion to remand the EPA Lawsuit back to EPA to adduce additional evidence – specifically, the “climategate” emails. *See* Exhibit 12, Joint Motion of the State of Alabama and the Commonwealth of Virginia to Remand to Adduce Additional Evidence (Case No. 10-1036, Document No. 1240064, filed Apr. 15, 2010). EPA the same day filed with the D.C. Circuit a motion to hold the EPA Lawsuit in abeyance while the Agency sorts out multiple petitions for reconsideration of its greenhouse gas ruling. Respondent’s Motion to Hold Case in Abeyance Pending Completion of Administrative Proceedings on Petitions for Reconsideration (Case No. 10-1036, Document No. 1240145, filed

The CIDs at Issue. On April 23, 2010, with its EPA Lawsuit pending, the Attorney General's Office served two nearly identical CIDs on the University, purportedly "in connection with an investigation by the Attorney General into possible violations by Dr. Mann" of FATA. Exhibit 1, CID No. 1-MM at 1 (Apr. 23, 2010) (served on the President of the University); Exhibit 2, CID No. 2-MM at 1 (Apr. 23, 2010) (served on the Rector of the University's Board of Visitors). The CIDs state only that the investigation "relates to data and other materials that Dr. Mann presented in seeking awards/grants funded, in whole or in part, by the Commonwealth of Virginia or any of its agencies." Exhibit 1 at 1; Exhibit 2 at 1. The CIDs also seek "data, materials and communications that Dr. Mann created, presented or made in connection with or related to [five specified] awards/grants." *Id.*

The five grants identified in the CIDs are the five grants listed in Dr. Mann's publicly available curriculum vitae that reference the University:

- | | |
|-----------|---|
| 2003-2006 | <i>Decadal Variability in the Tropical Indo-Pacific: Integrating Paleo & Coupled Model Results, NOAA-Climate Change Data & Detection (CCDD) Program</i> [Principal Investigators: M.E. Mann (U. Va), J. Cole (U. Arizona), V. Mehta (CRCES)] U. Va award (M.E. Mann): \$102,000 |
| 2002-2005 | <i>Remote Observations of Ice Sheet Surface Temperature: Toward Multi-Proxy Reconstruction of Antarctic Climate Variability, NSF-Office of Polar Programs, Antarctic Oceans and Climate System</i> [Principal Investigators: M.E. Mann (U. Va), E. Steig (U. Wash.), D. Weinbrenner (U. Wash)] U. Va award (M.E. Mann): \$133,000 |
| 2002-2003 | <i>Paleoclimatic Reconstructions of the Arctic Oscillation, NOAA-Cooperative Institute for Arctic Research (CIFAR) Program</i> [Principal Investigators: Rosanne |

Apr. 15, 2010). The D.C. Circuit denied the Commonwealth's motion to remand to EPA, in light of the pending petitions for reconsideration at the Agency, and granted the Agency's motion to hold the EPA Lawsuit in abeyance until the EPA has addressed the reconsideration filings. *See* Order (Case No. 10-1036, Document No. 1250245, filed June 16, 2010).

D'Arrigo, Ed Cook (Lamont/Columbia); Co-Investigator:
M.E. Mann] U. Va subcontract (M.E. Mann): \$14,400

2002-2003 *Global Multidecadal-to-Century-Scale Oscillations During
the Last 1000 years, NOAA-Climate Change Data &
Detection (CCDD) Program* [Principal Investigator:
Malcolm Hughes (Univ. of Arizona); Co-Investigators:
M.E. Mann; J. Park (Yale University)] U. Va subcontract
(M.E. Mann): \$20,775

2001-2003 *Resolving the Scale-wise Sensitivities in the Dynamical
Coupling Between Climate and the Biosphere,
University of Virginia-Fund for Excellence in Science
and Technology (FEST)* [Principal Investigator:
J.D. Albertson; Co-Investigators: H. Epstein, M.E. Mann]
U. Va internal award: \$214,700

See Curriculum Vitae of Dr. Mann, available at <http://www.meteo.psu.edu/~mann/Mann/cv/cv.html>, and attached as Exhibit B to the Attorney General's Answer. (The governmental entity that awarded the grants is bolded for ease of reference.)

The Commonwealth admits that the CIDs relate to those grants listed on Dr. Mann's CV that contain any reference to the University. See Answer ¶¶ 3, 13. But Dr. Mann's CV itself shows that the first four grants identified in the CIDs were awarded by federal, not Commonwealth, agencies and involved the disbursement of federal, not Commonwealth, funds. The fifth grant, the \$214,700 Resolving the Scale-wise Sensitivities grant, was an internal University grant awarded in 2001.

Specifically, the \$102,000 Decadal Variability grant was an award of federal funds from the National Oceanic and Atmospheric Administration ("NOAA")-Climate Change Data & Detection ("CCDD") Program, part of the United States Department of Commerce's Oceanic and Atmospheric Research Office, Climate Program Office.⁴ So, too, was the Global

⁴ The National Oceanic and Atmospheric Administration maintains a search function for federal grants at <https://grantsonline.rdc.noaa.gov/flows/publicSearch/begin.do>. Entering "Decadal Variability in the Tropical Indo-Pacific" brings up the University's grant of \$102,000

Multidecadal-to-Century-Scale Oscillations grant, on which the University had a \$20,775 subcontract.⁵ The \$103,000 Remote Observations grant was an award of federal funds from the National Science Foundation.⁶ The \$14,400 Paleoclimatic Reconstructions subcontract was part of a federal grant under a cooperative agreement between NOAA and the University of Alaska to form the Cooperative Institute for Arctic Research (“CIFAR”).⁷

Scope of the CIDs. The requests for information in the CIDs are sweeping in time and substance. For example, while the five identified grants appear to have been awarded between 2001 and 2003, the CIDs seek information from January 1, 1999 to the present – a period of *eleven years*. Indeed, if construed literally, there is no limit to how far back in time the CIDs reach. *See* Exhibit 1, Instructions at ¶ 1 (“Unless otherwise indicated, each paragraph of this [CID] relates to the period from January 1, 1999 through the present date. *Any documents prepared . . . before this time period but which relate thereto, are also to be produced.*”) (emphasis added).

The substance of the information requested is equally unbounded by logic or reason. Included among the requests are all “correspondence, messages or e-mails sent to or received by Dr. Michael Mann” and *thirty-nine* other scientists, as well “[a]ll research assistants, secretaries

in federal funding. The NOAA search results are attached as Exhibit 13, along with the CCDD program description from the Climate Program Office.

⁵ In the search function, *supra* n.4, entering “Global Multidecadal” brings up the University of Arizona’s grant of federal funding, for which the University of Virginia had a subcontract. *See* Exhibit 14.

⁶ *See* Exhibit 15, National Science Foundation, Award Abstract #125670, *available at* <http://www.nsf.gov/awardsearch/showAward.do?AwardNumber=0125670>.

⁷ *See* Exhibit 16, Excerpt from Report from Cooperative Institute for Alaska Research to NOAA on the second year of Cooperative Agreement No. NA17RJ1224 (1 July 2002–30 June 2003) at 4-5, *available at* <http://www.cifar.uaf.edu/research/annualreport2.pdf> (discussing the University subcontract under the grant funding).

or administrative staff with whom Dr. Mann worked while he was at the University of Virginia.” Exhibit 1 at 3, 7-8. In addition, the CIDs seek “[a]ll documents that constitute or that are in any way related to correspondence, messages or e-mails sent from Dr. Michael Mann to” any of these same individuals and “all documents that constitute or that are in any way related to correspondence, messages or e-mails sent to or from Dr. Michael Mann that reference” any of these same individuals. *Id.* at 8-9.

The CIDs do not identify any connection between the dozens of individuals mentioned in the CIDs and the five grants purportedly under investigation. Nor are the requests in the CIDs limited to documents and information related to Dr. Mann’s work on those five grants. Rather, the CIDs seek “*all* computer algorithms, programs, source code or the like created or edited by Dr. Michael Mann, in the time period *from January 1, 1999, to the present,*” as well as documents and information Dr. Mann used in his “day to day research or to produce *any* work product or result” – regardless of when created, used or produced, and without any other apparent nexus to the five identified grants. *Id.* at 11 (emphasis added).

Immediate effects of the CIDs. The issuance of the CIDs to the University had an immediate and forceful impact on the University and the Commonwealth’s other institutions of higher learning (and well beyond). The University of Virginia Faculty Senate Executive Council cautioned that the CIDs “directly threaten academic freedom and, thus, our ability to generate the knowledge upon which informed public policy relies.” Exhibit 17 (May 5, 2010). University Law School professors and Science Chairs, among others, have registered strong objections to the CIDs. *See* Exhibit 18, Letter from Richard C. Schragger, Professor of Law, University of Virginia, and other University of Virginia professors of law, to the Rector and Visitors of the University of Virginia (May 18, 2010); Exhibit 19, E-mail from Patricia Wiberg, Chair

Environmental Sciences, to University President Casteen (May 17, 2010). Academics and researchers from across the country – including those on both sides of the climate debate – have expressed intense opposition to the Attorney General’s purported FATA “investigation.” See Exhibit 20, Letter from Patricia W. Cummins, President, Virginia Conference of the American Association of University Professors (“AAUP”) to Attorney General Cuccinelli (May 6, 2010); Exhibit 21, Letter from Will Creeley, Foundation for Individual Rights in Education, to Attorney General Cuccinelli (May 12, 2010); Exhibit 22, T. Fuller, Global Warming: Open Letter to Virginia Attorney General Kenneth Cuccinelli (May 2, 2010), *available at* <http://www.examiner.com/x-9111-Environmental-Policy-Examiner~y2010m5d2-Global-warming-Open-letter-to-Virginia-District-Attorney-Kenneth-Cuccinelli>; Exhibit 23, Declaration of Molly Corbett Broad, President of American Council on Education (June 2, 2010).

After careful consideration, the University concluded that it would not answer the CIDs. Instead it filed this action challenging the CIDs as unlawful under FATA and an impermissible intrusion on academic and scientific speech and research. This memorandum supports the University’s request that the CIDs be set aside in their entirety.

ARGUMENT

I. THE CIDs ARE UNENFORCEABLE.

To be enforceable, a CID must comply with certain statutory and judicial requirements. See *United States v. Markwood*, 48 F.3d 969, 975 (6th Cir. 1995).⁸ The CIDs issued to the University fail to meet those requirements.

⁸ Courts in Virginia have turned to the more fully developed body of federal law for guidance when evaluating the enforceability of a CID issued pursuant to Virginia law. See, e.g., *In re Civil Investigative Demand*, 1981 WL 291003 (Va. Cir. Ct. June 3, 1981).

A. The CIDs Fail To Meet FATA's Statutory Requirements.

FATA places clear limits on the issuance of CIDs. To be valid, a CID must state “the nature of the conduct constituting the alleged violation of a false claims law that is under investigation,” and the Attorney General must have “reason to believe” that the CID recipient has information about a violation of FATA. Va. Code Ann. §§ 8.01-216.10(A), 8.01-216.11; *see also id.* at § 8.01-216.2 (definition of “investigation”). Neither statutory requirement is met here.

1. The CIDs do not describe the nature of any conduct that could have allegedly violated FATA.

The CIDs describe four federal grants and one University grant. The federal grants involve federal funds disbursed by federal agencies, as the descriptions in the CIDs (and Dr. Mann's CV) demonstrate. Exhibit 1 at 1-2, Exhibit 2 at 1-2. Numerous public sources, including those identified above at 7-8 & nn.4-7, confirm as much. But FATA does not authorize investigations of fraud in the procurement of *federal* funds. FATA is limited, and FATA CIDs are thus restricted, to investigations of fraud in the procurement of *Commonwealth* funds. *See* Va. Code Ann. § 8.01-216.2 (defining “investigation” as limited to potential violations of FATA); *id.* § 8.01-216.2 (defining “claim” as limited to requests or demands for Commonwealth funds); *see also Major League Baseball v. Crist*, 331 F.3d 1177, 1186-88 (11th Cir. 2003) (finding a Florida CID issued under antitrust laws invalid where there was no basis for a legal violation).

The fifth grant – the “Resolving the Scale-wise Sensitivities” grant – is an internal University grant. It was awarded in 2001. FATA did not become effective until January 1, 2003. *See* Virginia Acts 2002, c.842. It is settled law in Virginia that a statute applies only prospectively unless the General Assembly expressly states that the statute applies retroactively. *See, e.g., Berner v. Mills ex rel. Estate of Mills*, 38 Va. App. 11, 16 (2002), *aff'd*, 265 Va. 408

(2003).⁹ No such statement appears in FATA, and the CIDs identify no potentially fraudulent conduct related to any of the grants that occurred after FATA's effective date.

2. The Attorney General lacks an objective “reason to believe” that the requested information is relevant to a potential FATA violation.

The Attorney General also must have an objective “reason to believe” that the recipient of a CID has information relevant to a potential FATA violation. Va. Code Ann. § 8.01-216.10; *see Check 'n Go of Florida, Inc. v. State*, 790 So.2d 454, 456-57 (Fla. App. Ct. 2001) (interpreting “reason to believe” under Florida statute); *Evans v. State*, 963 P.2d 177, 183 (Utah 1998) (requiring objective evidence to satisfy “reasonable cause” standard under Utah law). Requiring an objectively reasonable belief is necessary to ensure that an investigation is more than just a “fishing expedition.” *Check 'n Go*, 790 So.2d at 456-57, 460; *see also Major League Baseball*, 331 F.3d at 1187-88 (relying on the Fourth Amendment limitations on the scope of investigatory power a state agency can exercise and holding that in issuing a CID, an attorney general “must have more than a mere intuition that illegal activity is afoot”) (citing Justice Holmes' decision in *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924) (“Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all

⁹ The U.S. Supreme Court recently confirmed that legislation enacting or amending similar false claim statutes does not apply retroactively unless the legislature expressly says so. *See Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010) (Congress did not expressly state that legislation amending federal False Claims Act applies retroactively to conduct predating amendment). *See also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (same); *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747 (S.D. Ohio 2009) (holding that applying substantive amendment to the federal False Claims Act to conduct that predates amendment would violate constitutional prohibition against retroactive punishment); Exhibit 24, *New Mexico ex rel. Foy v. Vanderbilt Capital Advisors, LLC*, No. D-101-CV-2008-1895 (N.M. Dist. Ct. Apr. 28, 2010) (holding that New Mexico Fraud Against Taxpayers Act could not be applied to conduct predating its effective date without running afoul of *ex post facto* clause).

our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.”) (internal citation omitted)).

The CIDs fail to identify *any* legitimate reason to believe that a FATA violation occurred. They accordingly, and relatedly, set forth no objective reason to believe that the University possesses information relevant to a potential FATA violation. *See* Exhibits 1, 2.

In public statements after the CIDs issued, the Attorney General has suggested that he (subjectively) believes a FATA violation occurred based on the so-called “climategate” emails.¹⁰ In its Answer, the Commonwealth similarly admits that it seeks essentially to re-hash the several previous investigations of statements and methods attributed to Dr. Mann in those emails. Answer ¶ 10. *See supra* at 3-4 & n.1 (detailing multiple investigations of “climategate” emails and the uniform outcomes of them). But it is not enough for the Attorney General to have “reason to believe” that some scientists may have manipulated data in their scientific research (despite the contrary conclusions of every other governmental and scientific body that has investigated such claims). Rather, the Attorney General must have “reason to believe” that a *FATA violation was committed*. The Attorney General’s candid interest in “climategate” suggests that the five grants identified in the CIDs are likely a pretext for a much broader investigation – one totally untethered to FATA.

¹⁰ *See, e.g.*, Exhibit 25, “Updated Statement Regarding University of Virginia CID and Investigation” (May 19, 2010) (“The revelations of Climate-gate indicate that some climate data may have been deliberately manipulated to arrive at pre-set conclusions. The use of manipulated data to apply for taxpayer-funded research grants in Virginia is potentially fraud.”), *available at* http://www.oag.state.va.us/PRESS_RELEASES/Cuccinelli/51910_VA_Tech.html; Exhibit 26, Rosalind S. Helderman, *State Attorney General Demands Ex-Professor’s Files from University of Virginia*, Wash. Post, May 4, 2010, at B01 (reporting Attorney General Cuccinelli’s statement that “[i]n light of the climategate emails, there does seem to at least be an argument to be made that a course was undertaken by some of the individuals involved, including potentially Michael Mann, where they were steering a course to reach a conclusion”).

B. FATA Does Not Authorize The Issuance Of A CID To The University.

The CIDs fail to meet the two threshold statutory requirements for issuance. And there is yet another threshold problem with them: FATA does not authorize the issuance of CIDs to a state entity like the University.

FATA authorizes CIDs to be issued to a “person” who may possess documentary material or information relevant to a FATA investigation, Va. Code Ann. § 8.01-216.10, and specifies that “ ‘person’ includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust.” *Id.* at § 8.01-216.2. The Commonwealth and her agencies are not among the “persons” identified in the statute. In contrast, the federal civil False Claims Act specifically defines the term “person” for purposes of that federal statute’s CID provision to mean “any natural person, partnership, corporation, association, or other legal entity, *including any State or political subdivision of a State.*” 31 U.S.C. § 3733(*l*)(4) (emphasis added).

The omission of any similar phrase in Virginia’s FATA statute is telling; it shows that the General Assembly chose *not* to extend the authority to issue CIDs to state entities like the University. *Cf. Simonian v. University & Community Coll. Sys. of Nevada*, 128 P.3d 1057, 1061 (Nev. 2006) (“Having thus considered the federal FCA’s definition of ‘person’ that expressly included state entities in the [CID] investigative context, the Legislature nevertheless chose not to similarly define ‘person’ in the Nevada FCA’s liability provision.”). Indeed, in other statutes, the General Assembly has defined “person” more broadly to include state entities. *See, e.g.*, Va. Code Ann. § 1-230 (“ ‘Person’ includes any . . . *government, political subdivision, or any other legal or commercial entity* and any successor, representative, agent, agency, or instrumentality thereof”) (emphasis added); *id.* § 5.1-1 (“ ‘Person’ means any . . . *government, political*

subdivision of the Commonwealth, or governmental subdivision or agency, . . .”) (emphasis added); *id.* § 8.01-412.9 (“ ‘Person’ means a[]. . . *government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity*”) (emphasis added).

The University – as an extension of the Commonwealth – is not bound by statutes of general application “unless named expressly or included by necessary implication.” *Commonwealth ex rel. Pross v. Board of Sup’rs of Spotsylvania*, 225 Va. 492, 494 (1983); *see also Richard L. Deal & Assocs. v. Commonwealth*, 224 Va. 618, 620 (1983) (“[T]he sovereign is a person or party within the intendment of a statute only when the General Assembly names it expressly or by necessary implication.”). This presumption is grounded in the notion that the Commonwealth, and by extension, the University, should not be deprived of any rights unless that deprivation is explicit. *Spotsylvania*, 303 S.E.2d at 889. Addressing whether a federal agency had to comply with a subpoena, the D.C. Circuit concluded that “persons” subject to subpoenas did not include federal agencies. *Al Fayed v. C.I.A.*, 229 F.3d 272, 273 (D.C. Cir. 2000); *see also COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 277 (4th Cir. 1999) (holding that subpoena proceedings “ ‘fall within the protection of sovereign immunity’ ”) (quoting *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989)). This Court should do the same and set aside the CID as unauthorized by FATA.

C. The CIDs Fail To Meet Judicial Standards For Enforceability.

There is more. The CIDs also should be set aside because the requests are breathtakingly overbroad and compliance with them would be unreasonably burdensome.

1. The information sought in the CIDs is not even remotely tailored to an investigation of a potential FATA violation.

A CID may only seek information “relevant to a [FATA] investigation.” Va. Code Ann. § 8.01-216.10(A); *see also id.* § 8.01-216.2. And a CID is enforceable only to the extent it

requests information that is not “ ‘excessive[]’ for the purposes of the relevant inquiry.” *In re Subpoena Duces Tecum*, 228 F.3d 341, 349 (4th Cir. 2000) (quoting *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 209 (1946)) (alteration by Fourth Circuit).¹¹ The Fourth Circuit has emphasized the importance of ensuring that the government adheres to the limitations on its authority: “The requirement that subpoenas be used only for a legitimate and authorized governmental purpose prohibits the government from ‘engag[ing] in arbitrary fishing expeditions’ and from ‘select[ing] targets of investigation out of malice or an intent to harass.’ ” *Id.* (quoting *United States v. R. Enters. Inc.*, 498 U.S. 292, 299 (1991)). The CIDs seek information far beyond what is relevant to an investigation of a potential FATA violation. By any measure, the requests are excessive.

The CIDs identify Va. Code Ann. § 8.01-216.3(A)(1), (2) and (3) as the statutory basis for the requests they contain. *See* Exhibit 1 at 1; Exhibit 2 at 1. But as explained above, those statutory provisions (and FATA generally) require allegations of false claims involving *Commonwealth* funds. The CIDs largely are directed to information relating to federal grants, rendering them hopelessly overbroad.

The Attorney General subsequently has suggested that FATA extends to false claims involving *federal* funds that happen to be spent “in Virginia.” Exhibit 25, Attorney General Press Release (May 19, 2010).¹² That is wrong. *See* Va. Code Ann. § 8.01-216.2 (definition of

¹¹ Federal courts have analogized CIDs to administrative subpoenas and have applied similar limitations on the exercise of government investigatory authority in both contexts. *See, e.g., Markwood*, 48 F.3d at 975 (“The district court was first called upon to decide whether the Department of Justice complied with the statute empowering it to issue the CID. The district court also had to apply the judicially-created standards for enforcement of administrative subpoenas and apply them to the facts of the case at issue.”).

¹² The Attorney General again suggested on a WVTF public radio talk show on June 15, 2010 that FATA authorized the Attorney General to investigate “federal dollars spent at a state institution.” *See* http://www.wvtf.org/news_and_notes/audio/201006152225230.EE_CUCCINELLI_PART_ONE.mp3 (audio file).

“claim” requires Commonwealth funds); *id.* § 8.01-216.3(A)(1), (2), (3) (all requiring a false or fraudulent claim). By requesting information about federal grants, the CIDs exceed the limited investigatory authority provided by FATA, because such information is not relevant to a potential FATA claim.

Moreover, even though FATA did not become effective until January 1, 2003, the CIDs seek documents dating back at least *four years* before the Act’s effective date. *See* Exhibit 1, Instructions at ¶ 1 (“Unless otherwise indicated, each paragraph of this [CID] relates to the period from January 1, 1999 through the present date. *Any documents prepared . . . before this time period but which relate thereto, are also to be produced.*”) (emphasis added). The CIDs are not only impermissibly broad retrospectively; they are overly broad prospectively as well, because they are framed to sweep in all communications up to the present day even though the last grant identified was awarded seven years ago.

The CIDs also are overly broad in terms of the types of information requested. Several of the requests are completely unlimited. *See* Exhibit 1, Request Nos. 1, 2, and 3 (seeking *all* communications with or referring to *thirty-nine* other scientists, and all of Dr. Mann’s research assistants, secretaries and administrative assistants, regardless of the subject matter of the communications); Request No. 9 (requesting *all* computer algorithms, programs, source code created by Dr. Mann); Request No. 8 (requesting *all* e-mail and correspondence from Dr. Mann since leaving the University). Other requests explicitly seek information about the *substance* of *all* of Dr. Mann’s academic work, regardless of whether it was related to the identified grants, which clearly extends beyond the relevant scope of a FATA investigation. *See, e.g.*, Request No. 5 (requesting substantive research materials generated pursuant to grants, regardless of whether they relate to any representations made to obtain any state funds).

A CID may only be used to investigate a potential FATA violation. And the information requested in it must be relevant to a potential FATA violation. Va. Code Ann. §§ 8.01-216.2, 216.10; *see In re Subpoena Duces Tecum*, 228 F.3d at 347 (citing *See v. City of Seattle*, 387 U.S. 541, 544 (1967)). The information sought here is so sweeping in scope and type that it fails that basic test.

2. Compliance with the CIDs would be unduly burdensome.

Compliance with the CIDs' sweeping requests also would be unduly burdensome. *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1301 (4th Cir. 1987) (finding "unreasonable and oppressive" subpoena unenforceable). Compliance would require the University to expend substantial effort *at the Commonwealth's expense* to identify, collect, review and produce all the information requested. It would be a colossal undertaking for the University to identify email, correspondence, research and other documents and information relating to a former faculty member's work at the University spanning a period of more than ten years and encompassing dozens of other University professors and employees. And while the immediate (and substantial) costs of that huge undertaking will be borne by the University, those costs will ultimately be borne by the Commonwealth because the University is a state institution.

These costs are all the more unreasonably burdensome when considered in context. Again, the grants identified in the CIDs do not implicate a potential FATA violation. Thus, enforcement of the CIDs will cause the University to expend Commonwealth funds – as well as the University's local funds – to no apparent end.

The CIDs also appear to be an attempt to avoid limitations on information collection available through other mechanisms. For example, discovery is not permitted in the EPA Lawsuit proceedings before the D.C. Circuit; that case is limited to the administrative record. And if the Attorney General were to attempt to obtain the information requested in the CIDs

through a freedom of information request, much of the requested information would not constitute a public record because it was not prepared “in the transaction of public business.” Va. Code Ann. § 2.2-3701; *see also* Exhibit 27, FOI Advisory Council Opinion AO-01-00 (Sept. 29, 2000) (e-mails that are not related to the transaction of public business are not “public records” under FOIA and therefore not subject to disclosure); Exhibit 28, FOI Advisory Council Opinion AO-11-08 (Nov. 18, 2008) (letter by university law professor, on university letter head and created on university computer, is not a public record because it was not made “in the transaction of public business”). And even among the public records requested, many would be protected from disclosure under the higher education research exception and the computer software exception. *See* Va. Code Ann. §§ 2.2-3705.4, 2.2-3705.1(7). In addition, the Office of the Attorney General would be obligated to reimburse the University for its costs. *See* Va. Code Ann. § 2.2-3704(F) (“A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.”).¹³

* * *

The Attorney General’s CIDs were issued just eight days after the Commonwealth filed a remand motion in the D.C. Circuit EPA Lawsuit requesting that the EPA adduce new evidence relating to the “climategate” emails. Exhibit 12, Joint Motion. The CIDs are not relevant to FATA; it appears they were issued to serve another agenda entirely. They should be set aside.

¹³ Paragraph 24 of the Attorney General’s Answer asserts that the University has somehow waived privilege and other protections because it has not filed a privilege log. The University’s Petition seeks to quash the CIDs in their entirety, and also specifically states as one of its Grounds for Relief on page 8 that: “[r]elief from the CIDs should be granted with respect to all documents and information covered by applicable statutory and common law privileges, protections and doctrines, and the University reserves the right to raise such objections with respect to specific documents and information as appropriate.” Given the stage in the proceedings and the breadth of the documents requested in the CIDs, the Attorney General’s assertion of waiver should be rejected out-of-hand.

II. IF ENFORCED, THE CIDs WILL INFRINGE ACADEMIC FREEDOM AND CHILL SCIENTIFIC DEBATE.

The foregoing defects in the CIDs are all the more troubling when their likely effect on faculty and researchers working at the Commonwealth's colleges and universities is taken into account. *See In re Grand Jury Subpoena*, 829 F.2d at 1297 (the context of the First Amendment "intensifies" concerns presented by a "sweeping subpoena duces tecum"). The CIDs challenge Dr. Mann's academic work, including the substance of his research and conclusions on climate science. The chilling effect of enforcing the CIDs at issue can hardly be overstated and cannot be ignored. *See id.* at 1299 (focusing on chilling effect in finding subpoena unenforceable).

A. The CIDs Infringe Academic Freedom.

The United States Supreme Court has observed that "[t]he essentiality of freedom in the community of American universities is almost self-evident To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). As Justice Frankfurter wrote in concurrence, government intervention in the academic community can "check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring); *see also McMillan v. Togus Reg. Office, Dep't of Veterans Affairs*, 294 F. Supp. 2d 305, 318 (E.D.N.Y. 2003) ("[S]ociety has a profound interest in the research of its scholars Compelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest.") (citation omitted), *aff'd*, 120 F. App'x 849 (2d Cir. 2005).

That freedom of “inquiry,” of rigorous and fearless academic study and debate, identified as a cherished American value in *Sweezy* embodies the principle that an institution’s scholars should be free to pursue their research and express their opinions and conclusions without fear of government intrusion or reprisal; it is a “special” First Amendment concern. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); see *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (infringement of scholarship can raise “[t]he danger of that chilling effect upon the exercise of vital First Amendment rights”); see also *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (“[a]cademic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students”).¹⁴ Thus, “to prevail over academic freedom, [1] the interests of government must be strong and [2] the extent of intrusion carefully limited.” *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982).

The Attorney General can establish neither prerequisite here. The Attorney General has no authority to investigate the four *federal* grants identified in the CIDs, rendering his interest in them non-existent. The Attorney General’s authority to investigate pre-FATA conduct in connection with a pre-FATA internal University grant is likewise missing. Nor do the Attorney General’s statements about the CIDs present a “carefully limited” intrusion into the expression of

¹⁴ Courts also have recognized a “scholar’s privilege” rooted in the First Amendment (also referred to as a “researcher’s privilege”), which safeguards against judicial interference with the academic process. See *Sweezy*, 354 U.S. at 261-62 (the First Amendment protects “findings made in the laboratory” and precludes “government intervention in the intellectual life of a university”) (Frankfurter, J., concurring); *Deitchman v. E.R. Squibb & Sons*, 740 F.2d 556, 560-61 (7th Cir. 1984) (observing that a university may have a qualified privilege in a medical registry due to the “vital public interest in promoting research of the type the [r]egistry carries out”). Institutions have a vital interest in protecting the data and other information related to their scholars’ research endeavors. Thus, in *Dow Chemical*, the Seventh Circuit affirmed quashing a subpoena for research data because enforcement of the subpoena would “threaten substantial intrusion into the enterprise of university research.” 672 F.2d at 1276. Similarly, in *In re R.J. Reynolds Tobacco Co.*, the court quashed a subpoena seeking study data from a medical school on the grounds that “forced compliance with the subpoena would result in interference with [the researchers’] academic freedom.” 518 N.Y.S.2d 729, 734 (Sup. Ct. 1987).

academic ideas. Quite the opposite. By their plain terms, the CIDs seek to sift through Dr. Mann's academic work and the substance of his research data, materials, discussions, debates, conclusions and correspondence with dozens of other scientists and academics over a period spanning more than ten years. *See* Exhibits 1 & 2 at 3-11. Intellectual pursuits – even when hotly contested – are not the province of the Attorney General's CID authority under FATA. *Cf. Feiner v. Mazur*, 1989 WL 646381, at *2 (Va. Cir. Ct. City of Richmond, Sept. 15, 1989) (leaving tenure decisions to academic institutions and their officials); *Corr v. Mazur*, 1988 WL 619395, at *2 (Va. Cir. Ct. City of Richmond, Nov. 22, 1988) (same).

To be sure, no freedom is absolute, and the University is not suggesting that academic freedom automatically and always trumps the Commonwealth's interest in investigating potential fraud. But where, as here, a CID or other request for information is defective on its face, and the information sought is so central to academic freedom or similarly cherished principles, courts correctly have refused to require compliance. *See, e.g., In re Grand Jury Subpoena*, 829 F.2d at 1300 (even when the First Amendment problems raised by a subpoena “do not, in and of themselves, rise to the level of constitutional violations, the concerns that underlie those constitutional provisions must enter into the balancing of interests” required in considering whether to quash a subpoena).

B. Enforcement Of The CIDs Will Chill Academic Inquiry And Interfere With Academic Debate.

Academic freedom is essential to the mission of institutions of higher learning; indeed, it is one of the express principles upon which Thomas Jefferson founded this University. It is not surprising, then, that the CIDs' dramatic intrusion on academic freedom was met with an immediate and unequivocal reproach from the University Faculty.

For instance, the University of Virginia Faculty Senate Executive Council issued a Position Statement on Attorney General’s Investigation of Dr. Michael Mann: “[The Attorney General’s] actions directly threaten academic freedom and, thus, our ability to generate the knowledge upon which informed public policy relies.” Exhibit 17 (May 5, 2010). The Faculty Senate of Virginia Commonwealth University issued a resolution agreeing with the University’s Position Statement stressing that “academic freedom allows scholars to express their opinions and conclusions without fear of reprisals or harassment” and that “impartial, stringent peer review by independent scientists is the proper manner of critiquing scientific work and seeking truth.” Exhibit 29, Virginia Commonwealth University Faculty Senate Resolution. The University Law School professors spoke just as plainly, calling the Attorney General’s CIDs “a significant threat to academic freedom.” Exhibit 18, Letter from Richard C. Schragger, Professor of Law, University of Virginia, and other University of Virginia professors of law, to the Rector and Visitors of the University of Virginia (May 18, 2010). The Chairs of the Science Departments stressed to the University President that “[s]cientific research must be guided by the questions that pose the greatest challenges to advancing our disciplines without fear of clashing with the ideological views of politicians.” Exhibit 19, E-mail from Patricia Wiberg, Chair Environmental Sciences, to University President Casteen (May 17, 2010). *See also* Exhibit 30, Declaration of William F. Ruddiman, retired Professor Emeritus in the University’s Department of Environmental Science, ¶¶ 5-8; Exhibit 23, Declaration of Molly Corbett Broad, President of the American Council on Education, ¶¶ 3-4; Exhibit 31, Declaration of Steven T. DeKosky, Vice President and Dean of the University’s School of Medicine, ¶¶ 5-8.

Other members of this Nation’s academic and research communities – from both sides of the political spectrum, as well as the climate change debate – offered the same view. The

Virginia Conference of the American Association of University Professors (“AAUP”) wrote to the Attorney General that “[a] core principle of academic freedom is that society benefits when faculty members are free to pursue truth, especially controversial matters of the day, without political interference or legal harassment.” Exhibit 20, AAUP Letter.

Similarly, the Union of Concerned Scientists stressed that: “If scientists are to be successful in serving the public good, they must have the freedom to explore ideas without fearing that any individual statement or email [sic] will be taken out of context.” Exhibit 32, Letter from Union of Concerned Scientists, to Attorney General Kenneth Cuccinelli (May 18, 2010). *See also* Exhibit 21, Letter from Will Creeley, Foundation for Individual Rights in Education, to Attorney General Cuccinelli (May 12, 2010) (“FIRE is greatly concerned about the threat to academic freedom posed by your decision to issue” the CIDs; “your office has put academic freedom in jeopardy.”); Exhibit 33, Statement of the Board of Directors of the American Association for the Advancement of Science Concerning the Virginia Attorney General’s Investigation of Prof. Michael Mann’s Work While on the Faculty of University of Virginia (May 18, 2010) (“[T]he manner in which this investigation is being conducted and the lack of a clear rationale for it suggest that the investigation may be aimed at something other than financial malfeasance. The request for information goes far beyond what is needed to determine financial propriety, including substantive emails with colleagues, computer codes, and the detailed data resulting from Dr. Mann’s work.”); Exhibit 34, Letter from Keith Seitter, Executive Director of American Meteorological Society, and Richard Anthes, President, University Corporation for Atmospheric Research to University President Casteen (May 14, 2010) (concurring with the University Faculty Senate statement and “urg[ing]” the University to “uphold” the tenets of academic freedom).

Strongly worded statements from within the University and beyond made the related point that – in addition to representing an incursion on academic freedom – enforcing the CIDs will chill academic speech, signaling that if an elected official disagrees with a scholar’s conclusions, that scholar may be subject to investigation. *See* Exhibit 17, Faculty Senate Statement (“[The Attorney General’s] action and the potential threat of legal prosecution of scientific endeavor that has satisfied peer-review standards send a chilling message to scientists engaged in basic research involving Earth’s climate and indeed scholars in any discipline.”); *see also* Exhibit 33, American Association for Advancement of Science Statement (“investigations such as that targeting Professor Mann could have a long-lasting and chilling effect on a broad spectrum of research fields that are critical to a range of national interests from public health to national security to the environment”). And while the effect of enforcing the CIDs is likely to reach far into the Nation’s academic and research communities, the Commonwealth’s colleges and universities are likely to be the hardest hit. As the chairs of the University’s Science Department Chairs have cautioned, “we have no doubt that [the CIDs] will have the chilling effect on research noted in the Faculty Senate’s statement and diminish the stature of science at the University in the eyes of the national and international scientific communities.” Exhibit 19, Wiberg E-mail; *see also* Exhibit 20, AAUP Letter (“We believe that [the CIDs] will have a chilling effect on research and debate at the Commonwealth’s institutions of higher education Highly sought-after scientists will most likely be reluctant to accept appointments at Virginia institutions if they believe their research conduct will be questioned for political, and not scientific, reasons”); *see also* Exhibit 30, Ruddiman Decl., ¶¶ 5-8; Exhibit 23, Broad Decl. ¶¶ 3-4; Exhibit 31, DeKosky Decl., ¶¶ 5-8.

Even one of Dr. Mann's strongest academic critics, Thomas Fuller, has roundly condemned the CIDs. As Fuller put it:

No matter what has prompted your investigation, there is no doubt that it will be interpreted as a witch hunt. If you are in fact investigating a credentialed scientist for results that do not suit your political opinion, that interpretation is correct. Unless you can reveal to the public prima facie evidence that shows cause for this investigation, I beg you to reconsider. There are ample avenues of professional and academic recourse for people like me who think he has done something wrong. But being wrong is not a crime, and intimidating scientists [is] not a path that this country, including I presume Virginians, should ever pursue.

Exhibit 22, T. Fuller, Global Warming: Open Letter to Virginia Attorney General Kenneth Cuccinelli (May 2, 2010), *available at* <http://www.examiner.com/x-9111-Environmental-Policy-Examiner~y2010m5d2-Global-warming-Open-letter-to-Virginia-District-Attorney-Kenneth-Cuccinelli> (emphasis added).

Successful scientific research entails rigorous debate and the free exchange of ideas. Enforcement of the CIDs would chill academic and scientific inquiry protected by the First Amendment. The CIDs are an extraordinary method of investigation, and they have no role to play in a scientific debate. FATA does not authorize the Attorney General to evaluate the quality of Dr. Mann's scholarship, or his research, or his methods, or the wisdom of his conclusions. Those scientific and academic questions are properly left to the individuals and institutions comprising our Nation's academic and research communities.

CONCLUSION

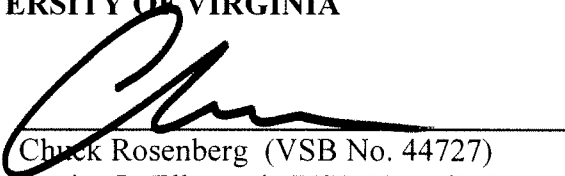
For the foregoing reasons, the University requests that this Court enter an order setting aside the CIDs in their entirety and providing such other relief as is deemed just and proper.

Date: June 29, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2010, a true and correct copy of the foregoing was served by U.S. Certified Mail, postage prepaid, as follows:

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